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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 138

KENTUCKY WHIP AND COLLAR COMPANY, - Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY, - Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit and Brief in Support Thereof.

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OCTOBER TERM, 1936.

No._____

KENTUCKY WHIP & COLLAR COMPANY, - *Petitioner,*

v.

ILLINOIS CENTRAL RAILROAD COMPANY, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case involves the constitutionality of an Act of Congress approved July 24, 1935 (49 Stat. 494; 49 U. S. C. A., Secs. 61-64), commonly known as the Ashurst-Sumners Act, said Act being in words and figures as follows:

"Chap. 412.—An Act To prohibit the interstate transportation of prison-made products in certain cases.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall be unlawful for any person knowingly to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transportating any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners (except convicts or prisoners on parole or probation), or in any penal or reformatory institution, from one State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof, or from any foreign country, into any State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof, where said goods, wares, and merchandise are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof. Nothing herein shall apply to commodities manufactured in Federal penal and correctional institutions for use by the Federal Government.

"Sec. 2. All packages containing any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prison-

ers, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, when shipped or transported in interstate or foreign commerce shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package.

"Sec. 3. Any person violating any provision of this Act shall for each offense, upon conviction thereof, be punished by a fine of not more than $1,000, and such goods, wares, and merchandise shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.

"Sec. 4. Any violation of this Act shall be prosecuted in any court having jurisdiction of crime within the district in which said violation was committed, or from, or into which any such goods, wares, or merchandise may have been carried or transported, or in any Territory, Puerto Rico, Virgin Islands, or the District of Columbia, contrary to the provisions of this Act."

The case was heard in the District Court for the Western District of Kentucky upon plaintiff's verified bill and petition for a declaration of rights (hereinafter called the bill) (R. 1-23) and upon defendant's motion to dismiss the bill (R. 24). The bill alleged the following facts:

The plaintiff, Kentucky Whip & Collar Company, is a corporation organized under the laws of the Commonwealth of Kentucky and engaged in the business of manufacturing in the Kentucky State Penitentiary at Eddyville with convict labor horse collars and strap goods, and in marketing same in the different States of the Union. The defendant, Illinois Central Railroad Company, is a corporation incorporated under the laws of the State of Illinois, and is engaged in the business of a common carrier by rail and is the principal carrier of the plaintiff's products to its customers. The plaintiff, on August 13, 1935, tendered to the defendant at its freight station at Eddyville, Kentucky, twenty-five separate shipments of collars and harness manufactured by the plaintiff with prison labor at its plant in Eddyville, Kentucky, for the purpose of having these shipments transported by the defendant to the consignees thereof, each of whom was located in a State other than Kentucky. Ten of these shipments were consigned to customers in ten different States, each of whose laws prohibited the sale within the borders thereof of any goods or merchandise manufactured or produced wholly or in part by convict labor. Five of these shipments were consigned to States whose laws did not prohibit the sale therein of convict-made goods, but did require that any such goods exposed for sale or sold should be plainly marked so as to indicate that they were convict-made. Ten of these shipments were consigned to States whose laws imposed no restrictions upon the sale or possession of convict-made goods within those States. All of the

tendered shipments were for the purpose of filling *bona fide* orders theretofore received by the plaintiff. None of the packages or articles therein contained bore any mark, label or brand thereon to indicate that the goods contained therein were manufactured or produced with prison labor. The defendant refused to accept said shipments and to transport same, and upon each bill of lading endorsed the following words: "Shipment refused because prohibited by Act of Congress approved July 24, 1935." Plaintiff's products are useful articles of commerce and are not in themselves in any particular harmful to the health, peace or good order of the communities into which they are shipped or in which they are used. It will be the policy of the defendant to refuse any shipments from the plaintiff of its prison-made articles where to accept and transport such shipments would violate the terms of the Act of Congress approved July 24, 1935, and the continued refusal of the defendant to accept the shipments tendered and similar shipments will operate to practically destroy plaintiff's business, which is largely of an interstate character.

The relief asked was that the defendant be mandatorily enjoined and required to accept and transport each of the enumerated twenty-five shipments and all future shipments of a similar character which may be tendered to it by the plaintiff, and further for a binding declaration of rights adjudging that the Act of July 24, 1935 is violative of the Constitution of the United States.

The District Court filed an opinion (R. 29-39), and found the facts as above set out (R. 39-41). His conclusions of law (R. 41-42) were that the Act of July 24, 1935, is unconstitutional in so far as it operates to prohibit the shipment in interstate commerce of convict-made goods into those States which prohibit the sale or possession of convict-made goods, but that the said Act is constitutional in so far as it prohibits the shipment of convict-made goods into those States which require that convict-made goods shall be so labeled as to indicate that fact before being sold or offered for sale, unless such goods are so labeled before interstate shipment, and that the Act is constitutional in so far as it requires the containers of all convict-made goods shipped in interstate commerce to be so labeled before shipment as to indicate that they are convict-made, with the name and location of the prison where made, and that the constitutional provisions of the Act are separable from the unconstitutional provisions. Having found that the tendered shipments were not labeled as required by the Act, the District Court dismissed plaintiff's petition (R. 42). The case was then appealed to the United States Circuit Court of Appeals for the Sixth Circuit, and on June 1, 1936, that Court affirmed the decree of the District Court (R. 51), and held the entire Act of July 24, 1935, to be constitutional (R. 52-56).

II.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The statute here involved vitally affects the right of the respective States to employ or permit the employment of their convicts in the manufacture of useful and harmless articles of commerce for sale and shipment in interstate commerce, and presents grave constitutional questions; and the public interest will be promoted by a decision by this Court of the questions involved.

2. The United States Circuit Court of Appeals, in holding that in the enactment of the law Congress did not transcend its constitutional powers, decided a federal constitutional question in a way probably in conflict with the applicable decisions of this Court.

3. The Circuit Court of Appeals, in holding that in the enactment of the law Congress did not transcend its constitutional powers, decided an important question of federal law, which has not been, but should be, decided by this Court.

PRAYER FOR WRIT.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court

for its review and determination a full and complete transcript of the record and all proceedings of the said Court had in this case, numbered and entitled on its docket No. 7235, Kentucky Whip & Collar Company, Appellant, v. Illinois Central Railroad Company, Appellee, to the end that this cause may be reviewed and determined by this Court, and that the decree of said Circuit Court of Appeals may be reversed, and for such further relief as to this Court may seem proper.

KENTUCKY WHIP & COLLAR COMPANY,
Petitioner.

By CHAS. I. DAWSON,
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Supreme Court of the United States

OCTOBER TERM, 1936.

KENTUCKY WHIP & COLLAR COMPANY, - *Petitioner,*

v.

ILLINOIS CENTRAL RAILROAD COMPANY, - *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF COURTS BELOW.

The opinion of the United States District Court for the Western District of Kentucky (R. 29-39) is reported in 12 Fed. Supp. 37. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 52) was rendered June 1, 1936, and has not been officially reported.

II.

JURISDICTION.

1. The decree of the United States Circuit Court of Appeals for the Sixth Circuit, a review of which is here sought, was entered June 1, 1936 (R. 51).

2. The statutory provision which is relied upon to sustain the jurisdiction of this Court is Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (Sec. 347, Title 28 U. S. C. A.).

3. The suit is one in equity of a civil nature between citizens of different States, arising under the Constitution and laws of the United States, and the matter in controversy, exclusive of interest and costs, was alleged in the bill (R. 2) to exceed the sum of $3,000.00, and was so found by the Court (R. 40).

III.

STATEMENT OF THE CASE.

The statement in the preceding petition for a writ of certiorari, Par. I, pages 1-6, is hereby adopted and made a part of this brief without further elaboration.

IV.

SPECIFICATION OF ERRORS.

Petitioner intends to urge and rely upon each of the errors assigned in its assignment of errors in the District Court (R. 45, 46), which are as follows:

1. The Court erred in holding that the Act of July 24, 1935, in so far as it operates to prohibit the shipment in interstate commerce of convict-made goods into those States which require that convict-made goods shall be so labeled as to indicate that fact before being sold or offered for sale, unless such goods

are so labeled before interstate shipment, is a valid exercise of the power of Congress under the Constitution.

2. The Court erred in holding that Congress has the power to require that the containers of all convict-made goods shipped in interstate commerce shall, before shipment, be so labeled as to indicate that they are convict-made, and the name and location of the prison where made, as required by Section Two of the Act of July 24, 1935.

3. The Court erred in holding that Section Two of the Act is separable, and is valid and enforceable, notwithstanding the invalidity of that part of Section One of the Act which operates to prohibit the shipment in interstate commerce of convict-made goods into those States where the sale of convict-made goods is prohibited by the laws of such States.

4. The Court erred in holding that that part of Section One of the Act which operates to prohibit the shipment in interstate commerce of unlabeled convict-made goods into States requiring such goods, before sale or exposure for sale, to be so labeled as to indicate that they are convict-made, is separable, and is valid and enforceable, notwithstanding the invalid portions of Section One of the Act.

5. The Court erred in holding that the defendant was not required to accept the shipments alleged in the bill to have been tendered to defendant for transportation to and delivery in those States whose laws require convict-made goods to be labeled as convict-made before sale or exposure for sale.

6. The Court erred in holding that the defendant was not required to accept any of the shipments tendered to it as alleged in the bill, because the containers in which they were offered were not labeled, as required in Section Two of the Act.

7. The Court erred in holding that plaintiff was not entitled to the relief sought, and in dismissing its bill.

8. The Court erred in refusing to find as requested by plaintiff that the articles manufactured by it in and of themselves are not harmful to the general welfare of the communities into which they are shipped and in which they are used.

V.

ARGUMENT.

POINT 1.

The Decision of the Circuit Court of Appeals Holding that Congress has the Power to Prohibit the Shipment of Convict-made Goods into States Having Laws Prohibiting the Sale or Possession of Such Goods, or Their Exposure for Sale, Without Labeling Them, is Contrary to and in Conflict with the Decisions of this Court.

The District Court found as a fact that petitioner's products are not in themselves in any particular harmful to the health, peace or good order of the communities into which they are shipped or in which they are used (R. 41). With such a finding in the record, the decision of the Circuit Court of Appeals is in conflict with the decisions of this Court relating to goods pro-

duced in factories employing child labor. *Hammer* v. *Dagenhart*, 247 U. S. 251; *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20. As Congress lacks the power under the Constitution to prohibit the shipment of harmless articles in interstate commerce, this power can not be enlarged by State statutes. This Court said in *C. L. Ashton, et al.*, v. *Cameron County Water Improvement District No. One*, —— U. S. ——, decided May 25, 1936:

> "Neither consent nor submission by the States can enlarge the powers of Congress; none can exist except those which are granted."

The decision of the Circuit Court of Appeals seems clearly in conflict with the opinion of this Court in the case of *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U. S. 311, sustaining the Webb-Kenyon Act, which prohibited the transportation in interstate commerce of intoxicants intended to be used, possessed or sold in violation of the laws of the State of destination. The last paragraph of that opinion (p. 332) contains an emphatic warning to Congress, and an equally emphatic assurance to citizens, that the power of Congress under the Constitution to regulate interstate commerce does not extend to prohibiting or limiting interstate movements of useful and harmless articles of commerce.

We think the Circuit Court of Appeals was in error in assuming that *Whitfield* v. *Ohio*, —— U. S. ——, 80 L. Ed. 527, 56 Sup. Ct. 532 (decided March 2, 1936), sustaining the Hawes-Cooper Act, is conclusive of the

questions here involved. That case merely involved the validity of an Act which provides that prison-made goods shipped in interstate commerce shall be subject to the laws of the State of destination upon their receipt by the consignee, whether in the original package or otherwise. The decision in the Whitfield case was clearly forecast, if not compelled, by the cases of *In Re Rahrer,* 140 U. S. 545, and *Rhodes* v. *Iowa,* 170 U. S. 412, which, when read together, would seem to clearly establish the doctrine that the right of a consignee to sell in the unbroken package an article shipped in interstate commerce, free of any restriction of State laws, is merely an incident of the right to do business in interstate commerce, which can be taken away by Congress, irrespective of the character of the article involved, without impairing the right of interstate commerce to be free from State interference or regulation in its fundamental aspects. As we read the Whitfield case, this Court did not have before it any question of the power of Congress to prohibit or limit the right of a citizen to sell, ship and deliver in interstate commerce useful and harmless articles, as is here presented. The question presented and considered by this Court in that case was the power of Congress to deprive a consignee of the right to sell in the unbroken package an article received through the channels of interstate commerce. While the opinion contains some discussion of the effect of selling prison-made goods in competition with the products of free labor, we respectfully submit that such discussion, particularly in view of the law as announced in the

cases of *In Re Rahrer, supra,* and *Rhodes* v. *Iowa, supra,* was not essential to a decision of the questions involved in the Whitfield case and should not be regarded as conclusive of the questions here involved; nor should that case be regarded as overruling the principle announced in *Clark Distilling Co.* v. *Western Maryland Railway Co., supra.*

POINT 2.

The Circuit Court of Appeals Erred in Holding that the Act is Valid in so Far as It Requires Labeling of All Packages Containing Convict-made Goods Shipped or Transported in Interstate Commerce, Regardless of Their Destination.

If petitioner's contention under Point 1 is correct, it, of course, follows that the decision of the Circuit Court of Appeals can not be sustained on its theory that labeling can be required in aid of enforcing a valid prohibition of interstate shipments of convict-made goods.

If the labeling provisions be construed separately, they are vulnerable to the same contentions advanced under Point 1. The difference in degree between prohibition and the requirement of labeling does not bring within congressional control goods which are not in themselves in any particular harmful to the health, peace or good order of the communities into which they are shipped or in which they are used. The labeling of convict-made goods serves no useful requirement in their movement in interstate commerce. Such a requirement can not be said to afford protection to

the public against fraud or imposition. The only result would be to appeal to the prejudices some classes of people may have against convict-made goods. The attainment of such a result is not a proper function of the police power. *People* v. *Hawkins,* 157 N. Y. 1; *Opinion of Justices of Supreme Judicial Court of Massachusetts,* 211 Mass. 605; *Matter of Foley,* 172 Calif. 744; *People* v. *Raynes,* 120 N. Y. Supp. 1053, affirmed 189 N. Y. 539; *Ex Parte Hayden,* 147 Calif. 649, 1 L. R. A. (N. S.) 184.

However, petitioner contends that it is not necessary to pass upon the validity of the labeling requirements of the Act. If petitioner is correct in its position that Congress can not prohibit the shipment in interstate commerce of prison-made goods, regardless of the laws of the States, Section 1 of the Act, in so far as it provides that goods shall not be shipped without labels into States which require labeling, can not be supposed to have been intended to stand alone, because the result would be that the Act would not apply to shipments into States where sales of convict-made goods are prohibited, but would apply to shipments into States requiring only labeling. Therefore, Section 1 in its entirety must be stricken, even though some of its provisions may be within the scope of congressional power. *The Employers' Liability Cases,* 207 U. S. 463; *Trade-Mark Cases,* 100 U. S. 82; *Butts* v. *Merchants Transportation Co.,* 230 U. S. 126; *James* v. *Bowman,* 190 U. S. 127, 139; *Illinois Central R. Co.* v. *McKendree,* 203 U. S. 514, 527, 528; *United States*

v. *JuToy,* 198 U. S. 252; *United States* v. *Reese,* 92 U. S. 214, 220, 221; *Baldwin* v. *Franks,* 120 U. S. 678.

Section 2 of the Act, requiring labeling of packages regardless of the laws of the States into which they are shipped, must also fall with the invalid portions of Section 1. The Act has only four sections, and contains no separability clause. In the absence of such a clause, the presumption is against any intention on the part of the Legislature that the unobjectionable part of a statute should stand, even though other parts of the statute should be held invalid. *Williams* v. *Standard Oil Co.,* 278 U. S. 235, 241, 242; *Lynch* v. *United States,* 292 U. S. 571; *Dorchy* v. *Kansas,* 264 U. S. 286; *Hill* v. *Wallace,* 259 U. S. 44; *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330; *Trusler* v. *Crooks,* 269 U. S. 475, 482. Not only does the whole Act proclaim that it was the purpose of Congress not merely to require labeling of the containers of convict-made goods but to absolutely prohibit shipments of such goods where intended to be used in violation of the laws of the State to which they are consigned, but the title as well shows this to have been the purpose of Congress. The title reads as follows: "An Act to prohibit the interstate transportation of prison-made products in certain cases," and the title of an Act may be considered in determining the intent of Congress. *United States* v. *Fisher,* 2 Cranch, 358, 386; *Church of the Holy Trinity* v. *United States,* 143 U. S. 457, 462; *White* v. *United States,* 191 U. S. 545; *Fairport R. Co.* v. *Meredith,* 292 U. S. 589.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the constitutionality of the Act of Congress here under attack may be promptly, finally and authoritatively determined, and to that end a writ of certiorari should be granted and this Court should review and reverse the decision of the United States Circuit Court of Appeals for the Sixth Circuit.

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